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No. ____

In the Supreme Court of the United States

OCTOBER TERM, 1999

THE VOTING INTEGRITY PROJECT, INC., JOSEPH PEÑA, FRANCISCO C. CARRILLO, JOE HERNANDEZ, PEDRO VILLA, AND THEO S. COPELAND,
Petitioners,

v.

ELTON BOMER, SECRETARY OF STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 17, 2000

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QUESTION PRESENTED

Whether 2 U.S.C. §§ 1 and 7 and 3 U.S.C. § 1, which establish "the Tuesday next after the first Monday in November" in election years as Federal Election Day, preempt Texas Election Code §§ 81.001, 82.003, and 85.001, which permit unrestricted voting in federal elections to begin seventeen days prior to Federal Election Day.

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit are the same as the parties to this proceeding: Petitioners The Voting Integrity Project, Inc.,* Joseph Peña, Francisco C. Carrillo, Joe Hernandez, Pedro Villa, and Theo S. Copeland; and Respondent Elton Bomer.

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* Pursuant to Supreme Court Rule 29.6, Petitioner The Voting Integrity Project, Inc., states that it has no corporate parents, affiliates, or subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

The Voting Integrity Project, Inc., Joseph Peña, Francisco C. Carrillo, Joe Hernandez, Pedro Villa, and Theo S. Copeland respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals is reported as *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773 (5th Cir. 2000), and reprinted in the Appendix ("App.")

at 1-10. The decision of the Court of Appeals affirmed the District Court's decision, which is reported as *Voting Integrity Project, Inc. v. Bomer*, 61 F. Supp. 2d 600 (S.D. Tex. 1999), and reprinted at App. 11-19.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit entered its judgment and opinion on January 17, 2000. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The United States Constitution, Article I, Section 4, clause 1, provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The United States Constitution, Article II, Section 1, clause 4, provides:

> The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

2 U.S.C. § 1 provides:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next.

2 U.S.C. § 7 provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

3 U.S.C. § 1 provides:

> The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

Act of May 23, 1872, ch. CXCVIII, 17 Stat. 157, provides:

> Be it enacted by the Senate and House of representatives of the United States of America in Congress assembled, That if by the now

> existing laws of any State the election commencing on the Tuesday next after the first Monday in November, eighteen hundred and seventy-two, for the purpose of choosing electors of President and Vice-President in such State shall be required to be continued for more than one day, then said election shall be continued the number of days required by the laws of such States.

Texas Election Code § 81.001(a) provides:

> In each election in this state, early voting shall be conducted by personal appearance at an early voting polling place and by mail.

Texas Election Code § 82.005 provides:

> Any qualified voter is eligible for early voting by personal appearance.

Texas Election Code § 85.001(a) provides:

> The period for early voting by personal appearance begins on the 17th day before election day and continues through the fourth day before election day, except as otherwise provided by this section.

STATEMENT OF THE CASE

In 1845, Congress enacted 3 U.S.C. § 1, which provides: "The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."

In 1872, the Forty-Second Congress amended 3 U.S.C. § 1 to permit, in the presidential election of 1872 *only*, states to hold their polls open for several days (as opposed to a single day). *See* Act of May 23, 1872, ch. CXCVIII, 17 Stat. 157.[1] Congress created this one-time exception to 3 U.S.C. § 1 largely because of the situation in Reconstruction-era *Texas*, where it was impossible to have single-day voting because each county was limited to one polling place at the county seat. *See* CONG. GLOBE, 42d Cong., 2d Sess. 3407-08 (1872).

That same year, the Forty-Second Congress also aligned the date of congressional elections with presidential elections by enacting 2 U.S.C. § 7, which provides that in every state "the Tuesday next after the 1st Monday in November, in every even numbered year, is established as *the day for the election*" for representatives to Congress. 2 U.S.C. § 7 (emphasis added). The principal sponsor of this legislation explained that one of the purposes of the act was to

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[1] Although not codified in the United States Code, this special statutory exception to 3 U.S.C. § 1 remains part of the Statutes at Large. Where there is a conflict between the Statutes at Large and the United States Code, the former prevails. *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964).

have a single uniform day for voting in federal elections. *See* CONG. GLOBE, 42d Cong., 2d Sess. 112 (1871) (remarks of Rep. Butler) ("*[O]n the day when one votes all should vote*, and . . . the whole question should be decided then.") (emphasis added).

When the Forty-Second Congress enacted 2 U.S.C. § 7 in 1872, it was aware that *Texas* then allowed *four days* for balloting in congressional elections because Texas law required voting at the county seat, and "it would be impracticable for all the voters of the county to go to the county seat and vote on one day." CONG. GLOBE, 42d Cong., 2d Sess. 676 (1872) (remarks of Sen. Trumbull). Because of this situation in Texas, an amendment to 2 U.S.C. § 7 was proposed that would have allowed Texas and other states to have multiple-day balloting. The Forty-Second Congress rejected the amendment on the basis that because the legislation provided that the effective date of 2 U.S.C. § 7 was delayed until 1876, Texas and other affected states would have four years to change their election laws to adjust to single-day balloting. Sen. Trumbull explained that

> *[t]here is no provision confining the elections of members of Congress to a single day until 1876*, and there will be enough time for these States to conform their legislation to the law, which will take effect in 1876. I am not sure now that this amendment is necessary at all. I rather think that it is not.

CONG. GLOBE, 42d Cong., 2d Sess. 677 (1872) (emphasis added).

Following ratification of the Seventeenth Amendment (providing for the direct election of senators), Congress designated Federal Election Day as the uniform national election date for senators. *See* 2 U.S.C. § 1. By aligning the election of senators under this section with the election date for representatives, a date that Congress had previously designated for presidential elections, Congress linked *all* federal elections and required such elections to be held "*on a single day throughout the Union.*" *Foster v. Love*, 522 U.S. 67, 70 (1997) (emphasis added).

In 1986, the Texas legislature enacted Tex. Elec. Code §§ 81.001(a), 82.005, and 85.001(a) (hereinafter collectively the "Early Voting Statutes"), which allow *all* voters to cast their votes for representative, senator, and presidential elector by personal appearance in the period beginning seventeen days prior to Federal Election Day and continuing through the fourth day prior to Federal Election Day, even if such voters are fully able to vote on Federal Election Day. In the 1992 presidential election, some Texas counties saw more than 40% of voters cast their ballots early by personal appearance. *See* FEDERAL ELECTION COMMISSION, EARLY VOTING 40 (1994).

Petitioners, five Texas voters and a non-partisan public interest organization (collectively "VIP"), commenced this action for declaratory and injunctive relief under 42 U.S.C. § 1983 against Texas Secretary of State Elton Bomer on January 26, 1999, in the U.S. District Court for the Southern District of Texas. VIP's first amended complaint alleged that the Texas Early Voting Statutes conflicted with 2 U.S.C. §§ 1 and 7 and 3 U.S.C. § 1 by permitting unrestricted early voting in

federal elections beginning seventeen days prior to Federal Election Day.[2]

The parties filed cross-motions for summary judgment. The District Court entered summary judgment in favor of the State on August 11, 1999, on the basis that Texas law did not conflict with federal law because an "election" consists of the *tallying* of votes, and in Texas votes are tallied on Federal Election Day. *See Bomer* at App. 17-18.[3]

On January 17, 2000, the Court of Appeals for the Fifth Circuit affirmed the District Court's holding that the Texas Early Voting Statutes do not conflict with 2 U.S.C. §§ 1 and 7 and 3 U.S.C. § 1 (collectively, the "Federal Election Day Statutes"). The Fifth Circuit did not, however, adopt the District Court's definition of an

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[2] The Petitioners did *not* challenge Texas' for cause absentee balloting statute, which provides early voting by mail for persons who expect to be absent from their county of residence on election day, *see* TEX. ELEC. CODE § 82.001; who suffer a physical disability that prevents them from appearing at the polling place on election day, *see id.* § 82.002; who are sixty-five years or older, *see id.* § 82.003; or who are confined in jail, *see id.* § 82.004.

[3] Contrary to the District Court's holding, vote-tallying in Texas is an *extended* process stretching over several weeks, beginning three days *before* (early votes are *counted* early) and extending for as much as thirty days *after* Federal Election Day. *See* TEX. ELEC. CODE §§ 87.0241(b)(2), 66.053(b), 66.053(c), 67.013, 67.014, 67.012(a), and 67.010(a). The District Court was plainly incorrect in holding that votes are "officially counted and reported only on" Federal Election Day. Presumably this accounts for why the Fifth Circuit affirmed only the result, and not the reasoning, of the District Court.

"election" as vote-tallying. Rather, the Fifth Circuit provided *no* definition of the word at all. Instead, it held that the Texas Early Voting Statutes do not violate the Federal Election Day Statutes "[b]ecause the election of federal officials in Texas is not decided until Texas voters go to the polls on federal election day." *Bomer* at App. 2. In upholding the Texas Early Voting Statutes, the Fifth Circuit cited several factors: (1) Texas law permits voting on Federal Election Day as well as early voting; (2) a majority of the votes are cast on Federal Election Day; (3) the election results are not released prior to Federal Election Day; and (4) federal elections in Texas are "not decided or 'consummated' before federal election day." *Bomer* at App. 5.

Because the Fifth Circuit did not actually provide an alternative definition of "election," it is not clear which of these factors (if any) was crucial or even determinative to its holding that beginning voting seventeen days before Federal Election Day is consistent with the Federal Election Day Statutes because the "election" is not "decided" until Federal Election Day.

The Fifth Circuit outlined several additional points to support its holding. First, Federal Election Day is not the *exclusive* day of the election, but rather is a mere *deadline* for completing an election that can be commenced at any time of a state's choosing. *See, e.g.*, *Bomer* at App. 6 (holding that states are not required to "*begin* their federal election on federal election day") (emphasis added); *id.* at App. 7 ("[C]ontrary to VIP's argument, some acts associated with the election may be conducted before the federal election day . . . ."). Second, Congress has taken no action to curb absentee voting, which every state permits in one form or

another, and indeed Congress has expressly sanctioned absentee balloting in certain circumstances. *See id.* at App. 7-9. Third, the legislative history of the Federal Election Day Statutes reveals that Congress' "concern [was] that citizens be able to exercise their right to vote," *id.* at App. 9, and the Texas Early Voting Statutes do not thwart Congress' objectives (as revealed from the legislative history) of preventing earlier elections from influencing later elections and of linking presidential and congressional elections so that voting in both is conducted at the same time. *See id.* at App. 9.

REASONS FOR GRANTING THE WRIT

Introduction

The Fifth Circuit's decision conflicts with this Court's decision in *Foster v. Love*, 522 U.S. 67 (1997), that the Federal Election Day Statutes mandate "holding all elections for Congress and the Presidency *on a single day* throughout the Union." *Id.* at 70 (emphasis added). Under the Fifth Circuit's decision, the Federal Election Day Statutes no longer mandate a single uniform date for holding federal elections. Instead, they establish a mere *deadline* for completing federal elections. The states are free to commence these elections *at any time*. In this regard, the Fifth Circuit decision also directly conflicts with the decision of the New Hampshire Supreme Court in *In re Absent Voters Law*, 80 N.H. 595, 113 A. 293 (1921), in which that Court held that 2 U.S.C. §§ 1 and 7 restrict all voting in congressional elections to Federal Election Day. *Id.* at 299.

The Fifth Circuit's decision also conflicts with basic principles of statutory construction outlined in several decisions of this Court. First, as this Court reiterated in *Gutierrez v. Ada*, 120 S. Ct. 740 (2000), later enactments of Congress have no bearing on the meaning and interpretation of earlier enactments in the absence of any indication that the later Congress focused on the meaning of the earlier enactment. In this case, the Fifth Circuit erroneously relied on the later enactments of Congress in the 20th century, as well as the failure of later Congresses to enact legislation, to ascertain the meaning of the Federal Election Day Statutes, which were enacted in 1845 and 1872.

Second, under this Court's decision in *Stone v. INS*, 514 U.S. 386, 397 (1995), amendments to statutes are presumed to have real and substantial effect. The Fifth Circuit's decision ignores the 1872 amendment to 3 U.S.C. § 1 permitting Texas to hold its polls open in the presidential election of 1872 over an extended period of several days. If 3 U.S.C. § 1 had already permitted multiple-day voting, as the Fifth Circuit decision holds, then the 1872 amendment to 3 U.S.C. § 1 was entirely superfluous.

Third, the Fifth Circuit decision conflicts with this Court's decision in *INS v. Cardoza Fonseca*, 480 U.S. 421 (1987), that Congress does not enact *sub silentio* language it specifically rejects. *Id.* at 442-43. When it enacted 2 U.S.C. § 7 in 1872, Congress specifically considered and rejected statutory language that would have permitted *Texas* to continue its practice of multiple-day voting. Instead, Congress delayed the effective date of 2 U.S.C. § 7 until 1876 so that *Texas* could bring its election system into compliance with this federal requirement of single-day voting.

Finally, this case involves a crucial issue of federalism: whether Congress has ultimate control over the timing of federal elections. The Constitution's Elections Clause[4] and its Executive Branch counterpart[5] give Congress "the final say" over the timing of congressional and presidential elections. *Foster*, 522 U.S. at 72. The Framers gave Congress the final word on this subject because they feared "the States' abuse of the power to set the 'Times, Places, and Manner' of elections." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-09 (1995). Under the Fifth Circuit's decision, states may disregard Congress' mandate of a uniform election day in favor of a "patchwork of state [election times], undermining the uniformity and national character that the Framers envisioned and sought to ensure." *Id.* at 822.

I. The Fifth Circuit's Decision Conflicts With This Court's Decision in *Foster v. Love*.

To determine whether Texas' opening of its polls on an unrestricted basis seventeen days before Federal Election Day conflicts with the Federal Election Day Statutes, it is only necessary to ask: (1) what constitutes an "election" within the meaning of the federal statutes; and (2) if the term "election" means the process of voting, is Federal Election Day the *exclusive* day of the election (and thus voting)?

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[4] U.S. CONST. art. I, § 4, cl. 1.

[5] U.S. CONST. art. II, § 1, cl. 4.

In *Foster*, this Court defined "election" as follows:

> When the federal statutes speak of "the election" of a Senator or Representative, they plainly refer to *the combined actions of voters and officials* meant to make a final selection of an officeholder (subject only to the possibility of a later run-off, see 2 U.S.C. § 8). See N. Webster, An American Dictionary of the English Language 433 (C. Goodrich & N. Porter eds. 1869) (defining "election" as "[t]he act of choosing a person to fill an office."). By establishing a particular day as "*the day*" on which *these actions* must take place, the statutes simply regulate the time of the election, a matter on which the Constitution explicitly gives Congress the final say.

Foster, 522 U.S. at 71 (emphasis added and footnote omitted).

Foster's construction of the term "election" is dispositive.[6] An election is the "combined *actions of*

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[6] Oddly, the Court of Appeals' opinion states that "VIP argues . . . that *Foster* does not control this case." *Bomer* at App. 6. That *Foster*'s definition of "election" is determinative of this matter is *precisely* what Petitioners argued below and contend here. *Foster*'s definition of "election," even if not technically the holding of this Court, is necessary to *Foster*'s result and thus is binding on lower federal courts. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

voters and officials meant to make the final selection of an officeholder." The combined actions of voters and officials in an election are the electorate's collective marking and depositing of ballots with election officials – in other words, voting. It is these *actions* meant to make the final selection of an officeholder that constitute an election.

Notably, this Court's construction of the term "election" in *Foster* specifically referred to an 1869 dictionary definition: "'[t]he act of choosing a person to fill an office.'" *Id.* (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 433 (C. Goodrich & N. Porter eds. 1869)). Lest there be any doubt about what such an "act" might be, the remainder of this 1869 definition provides the answer: "the act of choosing a person to fill an office or employment, *by any manifestation of preference, as by ballot, uplifted hands, or viva voce*; as, the election of a president or a mayor." WEBSTER, *supra*, at 433 (emphasis added).

In rejecting Petitioners' "argum[ent] that election is synonymous with voting," *Bomer* at App. 4, the Fifth Circuit declined to offer an alternative definition of "election." Instead, the Fifth Circuit cited this Court's definition of "election" in *Foster* and seized upon the "final selection" component of this definition (while ignoring the remainder):

> *Foster* teaches us that "election" means "the combined actions of voters and officials meant to make a final selection of an officeholder." Allowing some voters to cast votes before election day does not contravene the federal election statutes

> because the final selection is not made before federal election day.

Bomer at App. 6 (quoting *Foster*, 522 U.S. at 71). In so doing, the Court of Appeals manifestly ignored this Court's crucial words "combined *actions* of voters and officials" and confused cause (the combined actions of voters and officials) and intended effect (the final selection of an officeholder). It is the combined *actions* of voters and officials that constitute the "election." Those *actions* may or may not result in a final selection,[7] but under *Foster* it is the *actions* of voters and officials that constitute the holding of an election, as is confirmed by the next two sentences of that opinion:

> By establishing a particular day as "the day" on which these *actions* must take place, the statutes simply regulate the time of the election, a matter on which the Constitution explicitly gives Congress the final say.
>
> While it is true that there is room for argument about just what may constitute the final *act of selection* within the meaning of our law, our decision does not turn on any nicety in isolating what

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[7] For example, if a state has a majority-vote requirement, and no candidate secures a majority of the vote, there will be an "election" on Federal Election Day, but no final selection of an officeholder will result from that election and a run-off election will be held later pursuant to 2 U.S.C. § 8. *See Public Citizen v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993).

> acts a State must cause to be done on federal election day (and not before it) in order to satisfy the statute.

522 U.S. at 71 (emphasis added). The electorate expresses its will and makes the final selection of an officeholder through the act of *voting*. Under *Foster*, it is thus *voting* that constitutes the "election," and the Fifth Circuit's holding to the contrary conflicts with *Foster*.[8]

Foster recognizes not only that an "election" is synonymous with voting, but also that Federal Election Day is the *exclusive* day of the election. *See id.* at 70 (observing that the Federal Election Day Statutes mandate "holding all elections for Congress and the Presidency *on a single day* throughout the Union.") (emphasis added); *see also id.* at 71 (noting that the Federal Election Day Statutes establish "*a particular day as 'the day' on which these actions must take place* . . . .") (emphasis added). In this regard, *Foster* implicitly recognized the *expressio unius* canon of

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[8] Under one interpretation of the Fifth Circuit's opinion, the "final determination" occurs on election day because a majority of the electorate still votes on Federal Election Day. *Bomer* at App. 6 ("Allowing *some* voters to cast votes before election day does not contravene the federal election statutes because the final selection is not made before the federal election day.") (emphasis added). As previously noted, in some Texas counties more than 40% of the vote was cast early by personal appearance in the 1992 presidential election. The Fifth Circuit would apparently be willing to revisit this issue if, as is quite possible, that figure exceeds 50% in the future. The 50% threshold has already been met in Oregon. Under Oregon's new vote-by-mail system the vast majority of votes are cast through the mail prior to Federal Election Day.

statutory construction, which holds that when "'a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (quoting *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929)). Under the *expressio unius* principle, by designating Federal Election Day as *the* day for the election, Congress *prohibited* holding the election on any other day or days.

The Fifth Circuit in *Bomer* ignored the *expressio unius* principle. Instead it cited other language from *Foster* for the proposition that a federal election could be *commenced* prior to Federal Election Day:

> [T]he Court in *Foster* recognized that some acts pertaining to the election of federal officials would be performed on days other than federal election day in violation of § 7: "*. . . [O]ur decision does not turn on any nicety in isolating precisely what acts a State must cause to be done on federal election day (and not before it) in order to satisfy the statute* . . . ." We read the above language as a clear signal that contrary to VIP's argument, some acts associated with the election may be conducted before the federal election day without violating the federal election statutes.

Bomer at App. 6-7 (quoting *Foster*, 522 U.S. at 72) (emphasis added by the Fifth Circuit).

In *Foster*, this Court cautioned that it was only deciding the case before it, which involved a system

that more often than not produced conclusive elections in October, and that it was not defining once and for all the "final act of selection" that must occur on Federal Election Day (and not before it). *Foster*, 522 U.S. at 72.[9] *Foster* plainly contains no "signal" to lower courts that the election itself could be commenced *before* Federal Election Day. Indeed, this Court said precisely the opposite in the preceding paragraph in *Foster*: whatever the final *acts* of selection are ultimately determined to be, Congress has established "*a particular day* as 'the day' *on which these actions* must take place." *Id.* at 71 (emphasis added).

Admittedly, some acts *associated* with the election may be conducted prior to Federal Election Day. Registering voters and printing ballots are acts *associated* with the election that occur before it. *See, e.g.*, TEX. ELEC. CODE § 51.004 (regulating distribution of election supplies prior to election); *id.* § 18.042(a) (requiring registrar to deliver statement of number of registered voters by precinct to secretary of state "[n]ot later than the 20th day before the date" of the election); *id.* § 13.143(a) (requiring voters to register at least 30 days prior to election). Similarly, both determining the winner of an election by statewide canvass and certifying the results constitute acts *associated* with the election that occur after it. *See id.* §§ 67.012(a),

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[9] In a footnote, this Court in *Foster* added: "This case thus does not present the question of whether a State must always employ the conventional mechanics of an election. We hold today only that if an election does take place, it may not be consummated prior to the federal election day." 522 U.S. at 72 n.4. An election is consummated by voting, and in Texas, the process of consummating an election begins seventeen days prior to Federal Election Day when the polls are opened for unrestricted early voting.

67.013, 67.016. None of these events or "acts associated with the election" that occur either before or after the election constitute the *election* itself. Voting, on the other hand, is not merely "some act associated with the election." It is the *election itself*, and it is the *election* that must begin – and end – on Federal Election Day.

Finally, the Fifth Circuit's "definition" of an election is internally inconsistent and leads to absurd results, ultimately eviscerating the Federal Election Day Statutes themselves. Under the Fifth Circuit's opinion, an "election" does not occur until it is "decided." *Bomer* at App. 2. Accordingly, when the state chooses to *begin* voting is irrelevant. *See Bomer* at App. 6 ("All the statute requires is that the election be held that day."). Thus, under the Court of Appeals' opinion, there is no limiting principle as to when voting may begin in federal elections. It is thus mere fortuity that Texas allows voting to begin "only" seventeen days before Federal Election Day. Under the Fifth Circuit's opinion, Texas (or any other state) could allow voting to begin six months before Election Day – or, for that matter, a few days after the previous election cycle's Federal Election Day.

Indeed, under one reading of the Fifth Circuit's opinion, a state need have *no* voting on Federal Election Day at all, as long as it conducts some of the activities associated with an election or the "final selection," such as tallying votes and certifying the winner, on Election Day. *See Bomer* at App. 5 ("No election results are released until the votes are tabulated on federal election day. Because the election of federal representatives in Texas is not decided or 'consummated' before federal election day, the Texas scheme is not inconsistent with the federal election

statutes as interpreted in *Foster*."). The Fifth Circuit's logic dictates that Texas could completely decouple the time for voting for Congress and the Presidency by specifying that voting for the former would occur in June and the latter in August, so long as these elections were not "decided" until Federal Election Day by the tallying of votes. That logic, however, conflicts with this Court's holding in *Foster* that one of Congress' objectives in enacting 2 U.S.C. § 7 was to align *voting* for Congress and the Presidency on the same day so as to eliminate "the burden on citizens forced to turn out on two different election days in presidential election years." *Foster*, 522 U.S. at 73.

The significance of having an election day under such a reading of "election" ranges from minimal to nil. In effect, the Fifth Circuit's interpretation renders the very idea of an election day a nullity. *See Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995) ("It is an elementary rule of construction that 'the act cannot be held to destroy itself.'") (quoting *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)); *see also United States v. Turkette*, 452 U.S. 576, 580 (1981) ("[A]bsurd results are to be avoided . . . .").

II. The Fifth Circuit Decision Conflicts with the Decision of the New Hampshire Supreme Court in *In re Absent Voters Law*.

In *In re Absent Voters Law*, 80 N.H. 595, 113 A. 293 (1921), the New Hampshire Supreme Court issued an advisory opinion[10] as to the validity of legislation

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[10] Advisory opinions by the New Hampshire Supreme Court have the effect of declaratory judgments. *See* 113 A. at 299 ("The practical result is that these opinions have in

pending before the New Hampshire legislature that would "permit absent voters and voters who by reason of physical disability are unable to vote in person at biennial elections." 113 A. at 294. In reviewing the proposed legislation, the court noted that by enacting 2 U.S.C. §§ 1 and 7, "Congress has also fixed the day for the election of Senators and Representatives." 113 A. at 298-99. Accordingly, the court held that the pending bill, by allowing absentee ballots to be submitted prior to Federal Election Day, would conflict with federal law:

> *If the election is to be held on a certain day, the implication is that the vote must be cast on that day.* The bill before us permits the voter to part with all control over his vote, to vote in short as early before the day of election as he can obtain a ballot.

113 A. at 299 (emphasis added).[11] This decision directly conflicts with the Fifth Circuit's decision in *Bomer*, which holds that Federal Election Day is not the exclusive day for voting in federal elections.

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effect the weight of declaratory judgments upon questions within the jurisdiction of the court of which the justices are members.").

[11] The New Hampshire Supreme Court held that, for presidential elections, the pending bill was not preempted by 3 U.S.C. § 1. *See* 113 A. at 298 ("As the manner of making the appointments [to the electoral college] is left to the Legislature of each state, there can be no constitutional objection to the scheme now proposed.").

III. The Methods of Determining Congressional Intent Employed by the Fifth Circuit Conflict With Previous Decisions of This Court.

In *Bomer*, the Fifth Circuit stated that its "conclusion is consistent with a plain, common sense reading of the language of § 7." *Bomer* at App. 6. Despite that conclusion, the Fifth Circuit went beyond the plain language of the statute and examined various other sources to determine that Congress intended the word "election" to refer to something other than its plain and ordinary meaning.

First, the Fifth Circuit relied in part on legislation enacted a century or more *after* the Federal Election Day Statutes to conclude that Texas' Early Voting Statutes do not conflict with federal law. *Bomer* at App. 8 ("Congress has enacted at least three statutes authorizing absentee balloting before election day."). Specifically, the Court noted that Congress subsequently enacted legislation regarding (1) absentee balloting in presidential elections for voters who are actually absent from their electoral districts (the Voting Rights Amendments of 1970, 42 U.S.C. § 1973aa-1); (2) access to polling places for the physically handicapped and the elderly (the 1984 Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee *et seq.*);[12] and (3) absentee voting for

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[12] In fact, the 1984 Act does not "authorize absentee balloting." Rather, the Act requires that "all polling places for Federal elections [be] accessible to handicapped and elderly voters." 42 U.S.C. § 1973ee-1(a). If a handicapped or elderly voter is not assigned to an accessible polling place, states may discharge this obligation by ensuring that any handicapped or elderly voter "will be provided with an

voters who are overseas or in the military (the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 42 U.S.C. § 1973ff *et seq.*). Based on these statutes, the Fifth Circuit concluded that Congress "looks with favor on absentee voting," *Bomer* at App. 8, and, thus, early voting. Therefore, according to the Court of Appeals, it was able to discern the meaning of the Federal Election Day Statutes by reference to legislation enacted *more than a century after the fact*.

That 20th-century Congresses authorized "for cause" absentee balloting in limited circumstances is completely beside the point regarding the meaning of the 19th-century Federal Election Day Statutes. There is no indication that the later Congresses focused on the meaning of the 19th-century Federal Election Day Statutes at the time of the late 20th-century enactments cited by the Fifth Circuit. Very recently, this Court unanimously reaffirmed the principle that a later enactment of Congress has no bearing on the interpretation of an earlier act of Congress unless Congress specifically focused on the earlier act at the time of the later enactment: "[A]s we have said before, later laws that 'do not seek to clarify an earlier enacted general term and do not depend for their effectiveness upon clarification, or a change in the meaning of an earlier statute' are 'beside the point' in reading the first enactment." *Gutierrez*, 120 S. Ct. at 745 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998)).

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alternative means for casting a ballot *on the day of the election*." 42 U.S.C. § 1973ee-1(b)(2)(B)(ii) (emphasis added).

In determining congressional intent in enacting the Federal Election Day Statutes, the Fifth Circuit further looked to later legislative enactments *by states*:

> We do not believe that Congress would have allowed absentee balloting to occur under state laws if it attached the meaning to the federal election day statutes urged by VIP. More than a century ago, some states began to allow absentee voting, and all states currently provide for it in some form, yet Congress has taken no action to curb this established practice. *We are unable to read the federal election day statutes in a manner that would prohibit such a universal, longstanding practice of which Congress was obviously well aware.*

Bomer at App. 7-8 (citation omitted and emphasis added).

Contrary to this unsupported assertion by the Fifth Circuit, absentee balloting was neither longstanding nor universal *at the time Congress enacted the Federal Election Day Statutes in the 19th century*. In 1845, when 3 U.S.C. § 1 was enacted, absentee balloting was nonexistent. Similarly, absentee balloting did not exist when Congress enacted 2 U.S.C. § 7 in 1872. In 1861-65 during the Civil War, several (but not all) states enacted absent soldier voting laws, but some of these laws were invalidated by state courts, so that the legality of the practice was in doubt in 1872. *See* Emory Widener, Jr., Note, *The Virginia Absent Voters System*, 8 WASH. & LEE L. REV. 36, 37 n.7 (1951). In any event, the limited and far from universal practice

ended with the war, and civilian absentee balloting only began in 1896 when Vermont was the first state to permit it. *See* Edward B. Moreton, Jr., *Voting By Mail*, 58 S. CAL. L. REV. 1261, 1261 (1985). Even more significantly, *unrestricted* absentee balloting (which is functionally equivalent to the Texas Early Voting Statutes challenged here) is of much more recent vintage, dating only to the 1970s, when California and a few other states eliminated the "cause" requirement for absentee balloting. *See id.* at 1267. By 1985, only four states permitted unrestricted early voting in the form of unrestricted absentee balloting. *See id.* at 1263 n.9.

More importantly, regardless of what state practices have been, the Elections Clause allows *Congress* to make or alter regulations for elections at any time it wishes to do so. The *states*, however, possess no similar authority. If Congress creates a limited exception to the Federal Election Day Statutes, the most that can be said is that the act is perfectly legitimate because the Constitution permits Congress to do so. The same cannot be said of the states. *See* U.S. CONST. art. VI, § 2 (Supremacy Clause).

Moreover, under this Court's precedent, Congress' "failure to curb" the practice of absentee balloting in the states is not entitled to *any* significance. First, Congress does not enforce its own laws, which are not self-executing; governmental and private litigants do. Second, congressional silence "is a poor beacon to follow in discerning the proper statutory route," *Zuber v. Allen*, 396 U.S. 168, 185 (1969), as "[c]ongressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Id.* Put another way, "the search for significance in the silence of Congress is too often the pursuit of a mirage." *Sampson v. Murray*,

415 U.S. 61, 78 (1974) (citation and internal quotation marks omitted). Congress was equally "silent" for over two decades with respect to Louisiana's October open primary, but this Court attached no significance to that fact in *Foster*. That Congress has been "silent" for a decade and a half with respect to Texas' early voting scheme is of no greater significance. Given that Congress long ago mandated a single, uniform Federal Election Day, there has been no reason for it to "speak" by passing additional legislation.

Having reviewed the "subsequent legislative history," the Court of Appeals made one last conclusion based on its view of the actual legislative history of the Federal Election Day Statutes:

> Finally, we cannot conceive that Congress intended the federal election day statutes to have the effect of impeding citizens in exercising their right to vote. *The legislative history of the statutes reflects Congress's concern that citizens be able to exercise their right to vote.*

Bomer at App. 9 (emphasis added) (citing CONG. GLOBE, 42d Cong., 2d Sess. 3407-08 (1872)).

The legislative history cited by the Fifth Circuit does not support the conclusion that the Forty-Second Congress intended for states to allow multiple-day balloting in *all* elections. It actually stands for *precisely the opposite proposition*, for it involves the Forty-Second Congress' amendment to 3 U.S.C. § 1 permitting multiple-day voting in the presidential election of 1872 because of the unique situation in Texas, where single-day voting would have

disenfranchised many voters because of the limited number of polling places. Congress limited this special exception to 3 U.S.C. § 1 to 1872 exactly because it expected Texas to return to single-day balloting in 1876 at a greater number of polling places.

Were there any doubts about the plain meaning of 3 U.S.C. § 1, the Forty-Second Congress' amendment to that statute creating a one-time exception for multiple-day voting in the 1872 presidential election eliminates those doubts. When Congress "acts to amend a statute, [this Court] presume[s] it intends its amendment to have real and substantial effect." *Stone*, 514 U.S. at 397. Had Congress viewed 3 U.S.C. § 1 as permitting multiple-day voting, the 1872 amendment would have been pointless. Thus, "[t]he reasonable construction is that the [1872] amendment was enacted as an exception, not just to state an already existing rule." *Id.* As the 1872 amendment was "an explicit exception to the general applicability of [3 U.S.C. § 1], it must be construed as creating a procedure different from normal practice under [3 U.S.C. § 1]." *Id.* In other words, as the 1872 exception permitted multiple-day voting, the normal practice under 3 U.S.C. § 1 must be voting on Federal Election Day and no other.

Similarly, were there any doubt about the plain meaning of 2 U.S.C. § 7, the Forty-Second Congress' express rejection of statutory language permitting multiple-day balloting eliminates such doubt, as "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Cardoza Fonseca*, 480 U.S. at 442-43 (citation and internal quotation marks omitted).

Finally, the Fifth Circuit apparently declined to give effect to the Federal Election Day Statutes largely because it was concerned that to do so would require it to strike down for cause absentee balloting. *See Bomer* at App. 7 ("[W]e cannot logically hold that Texas' system of unrestricted advanced voting violates federal law without also finding that absentee balloting – which occurs in every state – violates federal law."). In effect, the Fifth Circuit rendered an advisory opinion as to the validity of for cause absentee voting, notwithstanding that petitioners did not and do not challenge this practice. It is well-established that the federal courts may not issue advisory opinions on contingent questions not before them. *See Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) ("It has long been the Court's considered practice not to decide abstract, hypothetical or contingent questions . . . .") (citations and internal quotation marks omitted); *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) ("[A] federal court lacks the power to render advisory opinions.").

IV. The Fifth Circuit's Decision That States May Commence Federal Elections at Any Time Implicates the Important Issue of Congressional Control Over Federal Elections.

Under the Fifth Circuit's opinion, Congress' command of national uniformity in the time of federal elections becomes a practical nullity, as does this Court's construction of the Federal Election Day Statutes in *Foster*. The very point of the Federal Election Day Statutes was to establish a single Federal Election Day for all federal elections. *Foster*, 522 U.S. at 70 (noting that Federal Election Day Statutes

provide for election of representatives, senators, and presidential electors to be held "*on a single day* throughout the Union.") (emphasis added). Since the 1970s, Texas and *eighteen* other states have enacted election laws providing for unrestricted early voting commencing on widely ranging dates in advance of Federal Election Day.[13]

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[13] In addition to Texas, unrestricted early voting exists in the following states: Alaska, *see* ALASKA STAT. § 15.20.010 (at least 15 days before election); Arizona, *see* ARIZ. REV. STAT. ANN. §§ 16-541 *et seq.* (at least 30 days before election); Arkansas, *see* ARK. CODE ANN. §§ 7-5-402, 7-5-418 (15 days before election); California, *see* CAL. ELEC. CODE § 3000 (29 days before the election); Colorado, *see* COLO. REV. STAT. ANN. § 1-7.5-108 (up to 55 days before the election); Idaho, *see* IDAHO CODE § 34-1001 (at least 43 days before the election); Kansas, *see* KAN. STAT. ANN. §§ 25-119, 25-120 (20 days before election); Nebraska, *see* NEB. REV. STAT. §§ 32-808, 32-938 (at least 35 days before the election); New Mexico, *see* N.M. STAT. ANN. §§ 1-6-3, 1-6-5 (40 days before the election); North Dakota, *see* N.D. CENT. CODE § 16.1-07-01 (40 days before the election); Oklahoma, *see* OKLA. STAT. ANN. tit. 26, § 14-105 (30 to 45 days before the election); Tennessee, *see* TENN. CODE ANN. § 2-6-101 *et seq.* (20 days before the election); Oregon, *see* OR. REV. STAT. §§ 254.465(2), 254.470 (20 days before the election) (voting by mail); Washington, *see* WASH. REV. CODE ANN. § 29.36.010 (45 days before the election); Wyoming, *see* WY. STAT. ANN. § 22-6-107, 22-9-101 (at least 40 days before the election).

Early voting is *operationally* unrestricted in the following states in that a voter need not show any reason why he or she is unavailable to vote on election day: Florida, *see* FLA. STAT. ANN. § 101.657 (available to any registered voter who is "unavailable to attend the polls on election day" beginning up to 45 days before the election at the discretion of each county); and Vermont, *see* VT. STAT. ANN. tit. 17, § 2531 (available to any registered voter who "expects to be an

The result is a "patchwork of state [election times], undermining the uniformity and national character that the Framers envisioned and sought to ensure." *U.S. Term Limits*, 514 U.S. at 822. This existing patchwork of conflicting periods for the holding of federal elections bears out the warning of Publius that "[i]f each State may choose its own time of election, it is possible there may be at least as many different periods as there are months in the year." THE FEDERALIST NO. 61, at 413 (Alexander Hamilton) (J. Cooke ed. 1961).

As the Framers considered national uniformity in the time of federal elections to be a "positive advantage," *id.*, and as they equally feared "the States' abuse of the power to set the 'Times, Places, and Manner' of elections," *U.S. Term Limits*, 514 U.S at 808-09, they gave Congress "the final say" on the subject. *See Foster*, 522 U.S. at 72. The Fifth Circuit's decision reduces Congress' say over this important national issue to a practical nullity and opens the door to further abuse of this power by the states.

In other election cases, this Court granted review where the election practices of a significant number of states were implicated or where significant federal interests were implicated. *See, e.g., Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 903 (2000) ("Given the large number of States that limit political

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absent voter" for any reason at least 35 days before the election).

Challenges to the unrestricted early voting systems in Tennessee and Oregon are currently pending in the Sixth and Ninth Circuits. *See Millsaps v. Thompson*, No. 00-52-56 (6th Cir.); *Voting Integrity Project, Inc. v. Keisling*, No. 99-35337 (9th Cir.). In *Millsaps* and *Keisling*, district courts upheld early voting systems in unpublished opinions.

contributions, we granted certiorari to review the congruence of the Eighth Circuit's opinion with *Buckley* [*v. Valeo.*]") (citations omitted); *U.S. Term Limits*, 514 U.S. at 806 ("Because of the importance of these issues [state imposed qualifications for congressional service beyond those established in the Qualifications Clause], we granted both petitions and consolidated the cases for argument.") (citations omitted); *see also Foster*, 522 U.S. at 70 (granting certiorari to determine whether an open primary system unique to Louisiana violated 2 U.S.C. §§ 1, 7). This case involves an election system (unrestricted early voting) used by nineteen states, and implicates the very important federal interest of congressional control over federal elections.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 17, 2000

Appendix

THE VOTING INTEGRITY PROJECT, INC., JOSEPH PEÑA, FRANCISCO C. CARRILLO, JOE HERNANDEZ, PEDRO VILLA, AND THEO S. COPELAND,
Appellants,

v.

ELTON BOMER, SECRETARY OF STATE OF TEXAS,
Appellees.

No. 99-20757

199 F.3d 773

United States Court of Appeals,
Fifth Circuit.

Jan. 17, 2000.

***774** M. Miller Baker (argued), Carr, Goodson, Lee & Warner, Washington, DC, Howard Louis Close, Orgain, Bell & Tucker, Beaumont, TX, Patrick Michael McSweeney, McSweeney, Burtch & Crump, Richmond, VA, for Plaintiffs-Appellants.

Deborah Anne Verbil (argued), Austin, TX, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before DAVIS, JONES and MAGILL[1], Circuit Judges.

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[1] Circuit Judge of the Eighth Circuit, sitting by designation.

W. EUGENE DAVIS, Circuit Judge:

Plaintiffs, Voting Integrity Project, Inc. and several individual Texas registered voters ("VIP"), appeal the district court's order denying their motion for summary judgment and granting defendant's cross motion for summary judgment. VIP contends that three sections of the Texas Election Code, which permit unrestricted early voting in federal elections, are preempted by federal election statutes that require that the "election" of members of Congress and presidential electors occur on federal election day. Because the election of federal officials in Texas is not decided until Texas voters go to the polls on federal election day, we conclude that the Texas early voting scheme is not inconsistent with federal election laws.

I

VIP filed this declaratory judgment action against Elton Bomer, the Texas Secretary of State ("the State"). VIP challenges Tex. Elec. Code §§ 81.001, 82.005, and 85.001 ("the Texas Early Voting statutes"), which allow voting to begin in Texas federal elections seventeen days before federal election day. Unlike traditional "absentee" voting statutes, the Texas Early Voting statutes do not require the voter to give any reason to vote early; the voter has the unrestricted right to vote early. Specifically, VIP contends that these statutes violate 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1, which establish the Tuesday after the first Monday in November as the day for the election of federal representatives, senators, and presidential electors throughout the United States.

The parties filed cross-motions for summary judgment. The district court found no conflict between Texas and federal law and granted summary judgment in favor of the State. VIP now appeals.

II

We review the granting and denial of summary judgment by the district court de novo. *Bodenheimer v. PPG Industries,* ***775** Inc., 5 F.3d 955, 956 (5th Cir.1993); *Mozeke v. Int'l. Paper Co.*, 856 F.2d 722, 724 (5th Cir.1988). We review the district court's denial of a permanent injunction for abuse of discretion. *Peaches Entertainment Corp. v. Entertainment Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir.1995).

III

A

The Elections Clause of the United States Constitution, Art. I, § 4, cl.1, gives states the responsibility for establishing the time, place, and manner of holding congressional elections, unless Congress acts to preempt state choices.[2] *Foster v. Love*, 522 U.S. 67, 68, 118 S. Ct. 464, 466, 139 L. Ed.2d 369 (1997). States "are given . . . a wide discretion in the formulation of a system for the choice by the people of

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[2] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. CONST., Art. I, § 4, cl. 1.

representatives in Congress." *U.S. v. Classic*, 313 U.S. 299, 311, 61 S. Ct. 1031, 1035, 85 L. Ed. 1368 (1941). Thus, a state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot directly conflict with federal election laws on the subject.

VIP contends that the Texas Early Voting statutes directly conflict with the federal election statutes establishing a single election day. 2 U.S.C. § 7 provides that the "Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States . . . of the United States, of Representatives and Delegates to the Congress. . . ." Titles 2 U.S.C. § 1 and 3 U.S.C. § 1 provide the same rule for electing Senators and presidential electors, respectively.

VIP contends that the federal statutes, by establishing "the day for the election," contemplate that the entire election, including all voting, will occur that day. 2 U.S.C. § 7 (emphasis added). They argue that "election" is synonymous with voting.

In *Foster*, the Supreme Court considered whether Louisiana's "open primary" statute conflicted with federal election statutes. 522 U.S. at 70, 118 S. Ct. at 467. Under Louisiana law, an open primary was held for congressional offices in October. *Id.* All candidates, regardless of party, appeared on the same ballot. *Id.* If any candidate received a majority of votes in the primary, he or she was considered "elected" without any further action on federal election day. *Id.* The Court held that Louisiana's open primary system conflicted with federal election statutes because the

"final selection" of candidates could be (and often was)[3] "concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress. . . ." *Id.* at 72, 118 S. Ct. at 467 (emphasis added).

Foster is instructive on the meaning of "election." 522 U.S. at 68, 118 S. Ct. at 466. The Court observed first that the term "election" in federal election statutes "plainly refer[s] to the combined actions of voters and officials meant to make a final selection of an officeholder." *Id.* at 71, 118 S. Ct. at 467. In striking down Louisiana's open primary statute, the Supreme Court held only that elections must not be "consummated" before federal election day. *Id.* at 72, n.4, 118 S. Ct. at 468.

With this background we turn to the challenged Texas system. Texas allows voting to begin early – seventeen days before federal election day. But the polls ***776** are open on federal election day and most voters cast their ballots that day. No election results are released until the votes are tabulated on federal election day.

Because the election of federal representatives in Texas is not decided or "consummated" before federal election day, the Texas scheme is not inconsistent with the federal election statutes as interpreted by the court in *Foster*.

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[3] Since the adoption of the open primary system in 1978, eighty percent of Louisiana's contested congressional elections ended with the open primary, without any voting on federal election day. *Foster*, 118 S.Ct. at 467.

VIP argues, however, that *Foster* does not control this case because *Foster* was not concerned with voting that began too early but rather with voting that ended too early, and its definition of "election" was devised to resolve that dispute. For the reasons that follow, we conclude that the Court would not alter its definition of "election" to require that states begin their federal election on federal election day.

First, the plain language of the statute does not require all voting to occur on federal election day. All the statute requires is that the election be held that day. *Foster* teaches us that "election" means "the combined actions of voters and officials meant to make a final selection of an office holder." 522 U.S at 71, 118 S. Ct. at 467. Allowing some voters to cast votes before election day does not contravene the federal election statutes because the final selection is not made before the federal election day. Second, this conclusion is consistent with the Supreme Court's refusal to give a hyper-technical meaning to "election" and its refusal to "[pare] the term 'election' in § 7 down to the definitional bone. . . ." *Id.* at 72, 118 S. Ct. at 467. We are satisfied that our conclusion is consistent with a plain, common sense reading of the language of § 7, the same approach the Court followed in *Foster* to interpret the statute.

Third, the Court in *Foster* recognized that some acts pertaining to the election of federal officials would be performed on days other than the federal election day in violation of § 7:

> While true that there is room for argument about just what may constitute the final act of selection

> within the meaning of the law, our decision does not turn on any nicety in isolating precisely what acts a State must cause to be done on federal election day (and not before it) in order to satisfy the statute. Without paring the term "election" in § 7 down to the definitional bone, it is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day . . . clearly violates § 7.

Id. (emphasis added).

We read the above language as a clear signal that contrary to VIP's argument, some acts associated with the election may be conducted before the federal election day without violating the federal election statutes.

Further, we cannot logically hold that Texas' system of unrestricted advanced voting violates federal law without also finding that absentee balloting – which occurs in every state – violates federal law.

We do not believe that Congress would have allowed absentee balloting to occur under state laws if it attached the meaning to the federal election day statutes urged by VIP. More than a century ago, some states began to allow absentee voting, and all states currently provide for it in some form, Edward B. Moreton, Jr., *Voting by Mail*, 58 S. CAL. L. REV. 1261, 1261-62 (1985); yet Congress has taken no action to curb this established practice. We are unable to read

the federal election day statutes in a manner that would prohibit such a universal, longstanding practice of which Congress was obviously well aware.

More recent legislation buttresses our conclusion that Congress looks with favor on absentee voting. Congress has enacted at least three statutes authorizing absentee balloting before election day.[4] In the *777 Voting Rights Act Amendments of 1970, 42 U.S.C. § 1973aa-1, Congress emphasized the importance of access to voting:

> (a) The Congress hereby finds that the ... lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections (1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice-President. . . .

Further, Congress has not only acknowledged but required absentee voting in certain circumstances. Sections 1973aa-1 (d),(e), (f) of the Voting Rights Act Amendments of 1970 require that citizens be allowed to vote by absentee ballot in Presidential elections on or before the day of the election.[5] Title 42 U.S.C. §

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[4] The Voting Rights Act Amendments of 1970, 42 U.S.C. § 1973aa-1; the 1984 Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee *et seq*; and the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 42 U.S.C. § 1973ff *et seq*.

[5] "[E]ach State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President . . . by all duly qualified residents of such

1973ee-3(c) requires the chief election officer of each state to "provide public notice, calculated to reach elderly and handicapped voters, of ... the procedures for voting by absentee ballot. . . ." The Uniformed and Overseas Citizens Absentee Voting Act (the "UOCAVA"), 42 U.S.C. § 1973ff-1, requires states to accept absentee ballots in federal elections from certain voters: "each State shall--(1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office. . . ."

B

Finally, we cannot conceive that Congress intended the federal election day statutes to have the effect of impeding citizens in exercising their right to vote. The legislative history of the statutes reflects Congress's concern that citizens be able to exercise their right to vote. See CONG. GLOBE, 42d Cong., 2d Sess. 3407-3408 (1872). Also, the Texas early voting system does not foster either of the primary evils identified by Congress as reasons for passing the federal statutes: "distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States, and ... the burden on citizens forced to turn out on two different election days to make final selections of federal officers in presidential election years. . . ." *Foster*, 522 U.S. at 73, 118 S. Ct. at 468. The challenged Texas statutes encourage voting by providing Texas voters with more opportunities to vote. Also, Texas law makes it illegal for election

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State who may be absent from their election district . . . on the day such election is held. . . ." 42 U.S.C. § 1973aa-1(d).

officers to reveal any election results before the polls close on election day. Tex. Elec. Code §§ 61.007 & 81.002.

In short, the Texas Early Voting statutes further the important federal objective of reducing the burden on citizens to exercise their right to vote by allowing them to vote at a time convenient to them, without thwarting other federal concerns.

IV

For the above reasons, we conclude that Sections 81.001, 82.005, and 85.001 of the Texas Election Code are not preempted by federal law. We therefore affirm the order of the district court.

AFFIRMED.

THE VOTING INTEGRITY PROJECT, INC., JOSEPH PEÑA, FRANCISCO C. CARRILLO, JOE HERNANDEZ, PEDRO VILLA, AND THEO S. COPELAND,
Plaintiffs,

v.

ELTON BOMER, SECRETARY OF STATE OF TEXAS,
Defendant.

Civil Action No. 99-247

61 F. Supp.2d 600

United States District Court,
Southern District of Texas,
Houston Division.

Aug. 9, 1999.

*601 M. Miller Baker, Carr Goodson Warner, Washington, DC, for plaintiff.

Deborah Anne Verbil, Office of the Texas Attorney General, Austin, TX, for defendant.

ORDER

HITTNER, District Judge.

Pending before the Court is the Motion for Summary Judgment filed by Plaintiffs Voting Integrity Project, Inc., et al. and the Cross Motion for Summary Judgment filed by defendant Elton Bomer. On May 12, 1999, the Court conducted a hearing in which the

parties submitted arguments to the Court for their perspective motions. After considering the motions, counsel's oral arguments, the submissions, and the applicable law, the Court has determined that the Motion for Summary Judgment should be denied and the Cross Motion for Summary Judgment should be granted.

Plaintiffs, a nonprofit, public interest organization domiciled in the Commonwealth of Virginia and several individual Texas registered voters, filed this declaratory judgment action on January 26, 1999. Plaintiffs seek to overturn the Texas Early Voting by Personal Appearance statutes ("Texas Early Voting statutes").[6] Plaintiffs ***602** claim that these statutes

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[6] Plaintiffs list the Texas statutes in consequential order:

1. Tex. Elec. Code Ann. § 82.005: "Any qualified voter is eligible for early voting by personal appearance."

2. Tex. Elec. Code Ann. § 85.001(a): "The period for early voting by personal appearance begins on the 17th day before election day and continues through the fourth day before election day, except as otherwise provided by this section."

3. Tex. Elec. Code Ann. § 85.001(c): "If the date prescribed by Subsection (a) or (b) for beginning the period is a Saturday, Sunday, or legal state holiday, the period begins: (1) on the next regular business day; or (2) on that Saturday or Sunday if early voting is ordered to be conducted on that day under Section § 85.006."

4. Tex. Elec. Code Ann. § 85.001(d): "If because of the date for which an election is ordered it is not possible to begin early voting by personal appearance on the prescribed date, the early voting period shall begin on the earliest date practicable after the

conflict with federal voting laws in that the Texas statutes permit Texas voters to cast their ballots before the federal election day as delineated by the United States Constitution and Title 2 U.S.C. § 7 (1999). The Constitution and Title 2 U.S.C. § 7 provide for an exclusive election day in the United States for the election of United States Representatives, United States Senators, and Presidential candidates. Plaintiffs allege that these early voting statutes will impair and dilute federal elections in that there is a high possibility that voters may vote more than once in any given election. Plaintiffs bring this claim pursuant to 42 U.S.C. § 1983 (1999) which states,

> Every person who, under color of any statute . . . of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

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prescribed date as set by the authority ordering the election."

5. Tex. Elec. Code Ann. § 85.005(a): "Except as provided by Subsection (c), in an election in which a county clerk or city secretary is the early voting clerk under Section 83.002 or 83.005, early voting by personal appearance at the main early voting polling place shall be conducted on the weekdays of the early voting period and during the hours that the county clerk's or city secretary's main business office is regularly open for business."

6. Tex. Elec. Code Ann. § 85.006(a): "Except as provided by Subsection (b), the authority ordering an election may order early voting by personal appearance at the main early voting polling place to be conducted on one or more Saturdays or Sundays during the early voting period."

> any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

The United States Constitution provides, in part, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. CONST. art. I, § 4, cl. 1. In 1872, Congress drafted Title 2 U.S.C. § 7, which provides, "The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter." Plaintiffs refer to this designation by Congress as the "Federal Election Day". As such, Plaintiffs argue that, by allowing early voting up to seventeen days in advance of Federal Election Day rather than limiting the voting to the day prescribed by statute, the Texas statutes impermissibly conflict with federal law.

Defendant argues the Texas Early Voting statutes comply with federal law. Defendant claims that, although the Texas voting for federal officials may take place before Federal Election Day, the actual tallying of the votes, and therefore the election of one individual to federal office, occurs on Federal Election Day. Accordingly, Defendant claims that the Texas statutes do not conflict with federal law.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled ***603** to judgment as a matter of law." Federal Rule of Civil Procedure 56(c). Thus, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986); *see also State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir.1990).

In analyzing the federal and state law, the Court must consider whether Congress intended to pre-empt the state legislation when it drafted Title 2 U.S.C. § 7. "Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604, 111 S. Ct. 2476, 2481, 115 L. Ed.2d 532 (1991) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 6 L. Ed. 23 (1824) (Marshall, C.J.)) "When considering pre-emption, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" 501 U.S. at 605, 111 S. Ct. at 2482 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947)).

In *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 109 S. Ct. 1262, 103 L. Ed.2d

509 (1989), the Supreme Court listed the considerations for determining whether a federal statute preempts the state law. First, the court should examine the express language of the statute to determine Congress' intent to pre-empt. 489 U.S. at 509, 109 S. Ct. at 1273. Absent this express language, the next inquiry examines whether Congress "has legislated comprehensively to occupy an entire field regulation." *Id.* A court may also consider whether the state law conflicts with the federal law in that compliance with both laws would be impossible or in that the state law would create too much of an obstacle to complying with the federal law. *Id.* In reviewing 2 U.S.C. § 7, the Court determines that Congress did not expressly pre-empt state law. Furthermore, the Court determines that Congress has not legislated to occupy the entire "field" of voting in federal elections.

The Court further determines that the Texas Early Voting statutes do not conflict with or impede the federal statute. In order to review this conflict, the Court must make a determination as to the meaning of the word "election" in the statute. *United States v. Ron Pair Enters.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030, 103 L. Ed.2d 290 (1989) (stating that statutory interpretation begins "with the language of the statute itself"). In this instance, the Court determines that the language of the statute is unambiguous. As such, "there is generally no need for a court to inquire past the plain language of the statute." *Id.* Webster's Third New International Dictionary 731 (3d ed.1986) defines "election" as "the act or process of choosing a person for office, position, or membership by voting." The etymology of the word "election" indicates a "choice" or "selection" of an individual. *Id.* Accordingly, the Court

determines that "election" constitutes the final selection of a certain individual for office.

The Supreme Court has recognized the difficulty in defining "election". In Foster v. Love, 522 U.S. 67, __, 118 S. Ct. 464, 467, 139 L. Ed.2d 369 (1997),[7] the Court stated, "When the federal statutes ***604** speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an office holder." The Court recognized "that there is room for argument about just what may constitute the final act of selection within the meaning of the law. . . ." *Id.* In determining a "final act of selection" this Court determines that it is, as the *Foster* Court indicated, the "combined actions of voters." *Id.* This Court further determines that, in order to determine the combined action or will of the voters, one must tally the votes.

Accordingly, an election or final selection requires the final tallying of the submission of votes. Under this definition, the Texas Early Voting statutes do not conflict with the federal statute. Although these Texas statutes allow the casting of votes before the Federal Election Day, the final tallying of the votes complies with the federal statute in that the votes are officially counted and reported only on the designated Tuesday

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[7] The Court notes that Plaintiffs rely on *Foster* to support their claims of Federal Election Day violations. In the *Foster* case, however, the Court voided the "open primary" statute in Louisiana which allowed for the final selection of United States Representatives and United States Senators prior to federal election day. As discussed infra, the Texas Early Voting statutes do not create a potential preemptive election of officials and therefore do not conflict with the Constitution or Title 2 U.S.C. § 7.

after the first Monday in every even year. 2 U.S.C. § 7. This definition allows Texas voters to comply with both the federal voting act and the Texas Early Voting statutes. Although Texans can vote for candidates seventeen days prior to the Federal Election Day, their candidates will only be elected after the tallying of the votes. This tallying takes place on Federal Election Day. Accordingly, Texas is in compliance with 2 U.S.C. § 7 in that the election is held on the appointed day.

This construction of "election" also complies with the purpose of Congress' act. In *Foster*, the Court indicated that Congress intended to address the "distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States," and ". . . the burden on citizens forced to turn out on two different election days to make final selections of federal officers in presidential election years. . . ." 522 U.S. at __, 118 S.Ct. at 468. As the votes are not tallied until the designated Federal Election Day, the casting of early, untallied votes cannot influence later voting in other states. Furthermore, Texas citizens are not burdened with the Texas voting system in that they have more days to vote for their candidates. Instead, voting is more convenient as a result of the Texas voting statutes. Lastly, the elimination of the Texas Voting laws would not assuage Plaintiffs' alleged harm of diluted voting. As noted in the May 12, 1999 hearing, a person desiring to vote in more than one state could easily access several states via air transportation and cast multiple votes. At the present time, Texas implements safeguards to prevent the dilution of votes. *See e.g.*, Tex. Elec. Code Ann. § 61.007. Accordingly, the Court deems that the voting laws in question need not be voided.

Based upon the foregoing, the Court hereby

ORDERS that the Plaintiffs' Motion for Summary Judgment is DENIED. Furthermore, the Court

ORDERS that the Defendant's Cross Motion for Summary Judgment is GRANTED.